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**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

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Decision

Matter of: E.L. Hamm & Associates, Inc.

File: B-290783; B-290783.2

Date: September 30, 2002

Michael L. Sterling, Esq., and Walter T. Camp, Esq., Vandeventer Black, for the protester.

Jennifer S. Zucker, Esq., and Peter D. Dipaola, Esq., Department of the Army, for the agency.

Mary G. Curcio, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency improperly failed to make final determination, required by solicitation, as to whether protester's proposal was acceptable or unacceptable is denied where record demonstrates that source selection official reviewed the evaluation results and concluded that the proposal was unacceptable.

DECISION

E.L. Hamm & Associates, Inc. protests the rejection of its offer under request for proposals (RFP) No. DABT60-01-R-0020, issued by the Department of the Army for visual information services. Hamm asserts that the Army improperly evaluated its proposal.

We deny the protest.

The solicitation, issued as part of a commercial activities study pursuant to Office of Management and Budget (OMB) Circular A-76 to select a private source to compete against the government's "most efficient organization" (MEO), was initially issued as a small business set-aside. However, the Army did not receive any offers and re-advertised the procurement on an unrestricted basis. The solicitation provided that the offeror submitting the technically acceptable proposal with the lowest realistic cost would be selected to compete against the MEO. RFP at 19. There were four evaluation factors: technical (with subfactors for phase-in, staffing plan, technical approach and work scheduling); management (organizational structure, management procedures and resumes for key personnel); past performance/experience; and cost. The technical factor was more important than

the management, past performance/experience and cost factors. Since the RFP anticipated the award as a cost-plus-award-fee contract, it provided that cost would be evaluated for realism, and that an unrealistically high or low cost proposal could be eliminated without further consideration. RFP at 21. The solicitation also provided that the Army intended to select an offeror to compete with the MEO without holding discussions.

Two proposals were submitted and first evaluated by the individual members of the source selection evaluation board (SSEB), who assigned each factor and subfactor an adjectival rating of acceptable, unacceptable or marginal. Contracting Officer's Statement (COS) at 4, 5. The SSEB then met and assigned a consensus rating to each factor and subfactor, and to the proposal overall. Id. at 4, 6. During the consensus evaluation, Hamm's proposal was rated marginal for the management and technical factors and acceptable for past performance/experience, id. at 6, 7, and the cost/price analyst determined that Hamm's proposed cost—[DELETED]—compared to the agency's estimate of Hamm's most probable cost (MPC)—[DELETED]—was unrealistically low. Id. at 8.

The conclusions of the SSEB and the cost/price analyst were consolidated in a price negotiation memorandum (PNM) that recommended that Hamm's proposal be given no further consideration because of its numerous and serious staffing deficiencies, the failure of its technical approach to recognize or mitigate technical, schedule and cost risks, and its unrealistic cost. PNM at 12. The source selection authority (SSA) reviewed the technical and cost evaluations and concluded that Hamm's proposal was technically unacceptable and did not provide a realistic cost. Source Selection Decision (SSD). The SSA therefore eliminated Hamm's offer from further consideration. The second offeror was also found unacceptable and the A-76 study therefore was terminated. Id.

Hamm challenges the technical evaluation on the narrow basis that the SSA's rejection of its proposal as unacceptable is contrary to the terms of the solicitation. Specifically, Hamm notes that the solicitation provided that initial technical proposals could be evaluated as acceptable, marginal or unacceptable, but that the final evaluation was to result in a rating of only acceptable or unacceptable. Hamm's initial proposal was rated marginal, and Hamm complains that the Army eliminated it before making a final determination that the proposal was unacceptable despite the fact that its proposal was rated marginal or acceptable for every factor and subfactor, and did not receive any unacceptable ratings. Hamm recognizes that the SSA stated in the SSD that its proposal was unacceptable, but argues that this determination did not meet the requirement for a final determination because it was not adequately documented and because the SSA did not exercise independent judgment.

This argument is without merit. In the PNM, the SSEB concluded that the proposal should not be further considered because it did not believe that Hamm could

successfully perform. In this regard, the SSEB rated Hamm's proposal overall marginal, defined in the RFP as follows: "any proposal that contains significant weaknesses. The contractor could possibly perform the services, but only if these weaknesses are corrected." RFP at 19. Since no discussions were held, however, and Hamm thus did not revise its proposal, the weaknesses remained and provided a reasonable basis for the SSA to conclude that, notwithstanding the adjectival ratings assigned by the evaluators, the proposal was unacceptable.¹

As for Hamm's further argument regarding documentation, an SSA decision is adequately documented where the SSA relied on reports and analyses prepared by others that are adequately documented. See Federal Acquisition Regulation (FAR) § 15.308; All Star Cabaco Enter., Joint Venture, B-290133, B-290133.2, June 25, 2002, 2002 CPD ¶ __. Here, the SSA based his source selection decision on his review of the findings of the SSEB and the cost/price analyst, which were presented to the SSA at an oral briefing. At that briefing the SSA received all reports, analyses and evaluations compiled during the procurement and discussed those evaluations with, among other people, the chairman of the SSEB. The reports received by the SSA included a detailed PNM that thoroughly discussed the evaluation of Hamm's proposal under each factor and concluded that the proposal should not be considered further. Supplemental Agency Report (SAR) at 4. Further, it is clear from the record that, while the SSA reviewed the PNM prepared by the SSEB and the cost/price analyst, and based his conclusion on that document, as well as, among other things, discussions with the chairperson of the SSEB, he reached an independent determination that Hamm's proposal was unacceptable. Specifically, the SSD discusses the SSEB and cost/price analyses and states that the SSA has "determined that E.L. Hamm & Associates [does not] represent an offer, which is technically acceptable with [a] realistic cost"²

¹ We also note that since the solicitation advised offerors that the agency intended to award the contract without holding discussions, no discussions were required. Century Elevator Inc., B-283822, Dec. 20, 1999, 99-2 CPD ¶ 112 at 4.

²Hamm attaches significance to the fact that the SSA received the reports at an oral briefing, arguing that the SSA could not have had enough time to adequately review the documents before making his decision. This argument is without merit. The record indicates that the SSA reviewed the PNM, SAR at 4, which consolidated the technical and cost evaluations, and was not voluminous—it consisted of only 12 pages. Moreover, the record indicates that the SSA not only received the PNM at the briefing, but also engaged in considerable discussion about the evaluation results with, among others, the chairman of the SSEB. Agency Report at 9. There therefore is no basis for finding that the SSA did not adequately understand the evaluation record before concluding that Hamm's proposal was unacceptable.

Hamm also complains that the agency improperly downgraded its proposal under the technical factor for proposing to cross-utilize personnel. This basis of protest is untimely. A protest that does not allege a solicitation impropriety must be filed within 10 days after the protester knows or should know the basis of protest. Where, as here, a protest follows a required debriefing, the protest will be considered timely if it is filed within 10 days after the debriefing. 4 C.F.R. § 21.1(a)(2) (2002). Hamm was on notice of the Army's concern regarding the explanation of its cross-utilization plan based on a June 14 letter from the Army to Hamm. Since Hamm then received a debriefing on June 21, it was required to challenge this aspect of the evaluation no later than July 1, 10 days later. Since Hamm did not raise the issue until August 8, it is untimely.

Hamm also argues that the Army improperly determined that Hamm's proposed cost was unrealistic and, further, that the Army should have held discussions with Hamm regarding its allegedly unrealistic cost. Our Office will not sustain a protest unless the protester demonstrates that it was prejudiced by the agency's actions, that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award. Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996); West Coast Unlimited, B-281070.2, Aug. 18, 1999, 99-2 CPD ¶ 40 at 4. As discussed above, the Army properly determined that Hamm's proposal was technically unacceptable; Hamm therefore was ineligible to receive the award, even if we assume, arguendo, that its proposed cost was realistic. It follows that Hamm was not prejudiced by any impropriety in the realism analysis. We therefore will not consider this basis of protest.

The protest is denied.

Anthony H. Gamboa
General Counsel